

**BOARD OF COUNTY COMMISSION
AGENDA ITEM SUMMARY**

Meeting Date: 7/20/05 - KW

Division County Attorney's Office

Bulk Item: Yes X No

Staff Contact Person: Bob Shillinger

AGENDA ITEM WORDING:

Approval to amend *Resolution No. 215-2005* (approved 6/15/05) to correct scrivener's errors in *Section 2*, and *Section 5*, and add specific language to clarify the Board's Final Determination DENYING the Beneficial Use Application filed by Merrick and Suzanne Kalan.

ITEM BACKGROUND:

Board Approval 4/20/05 to set and advertise Public Hearing for 6/15/05.
Public Hearing held 6/15/05.

PREVIOUS RELEVANT BOCC ACTION:

On 6/15/05 the BOCC approved the *Proposed Determination* of the Special Master DENYING the Beneficial Use Application filed by Merrick and Suzanne Kalan. (*Resolution No. 215-2005*)

CONTRACT/AGREEMENT CHANGES:

STAFF RECOMMENDATIONS:

Approval.

TOTAL COST: N/A

BUDGETED: Yes No

COST TO COUNTY: N/A

SOURCE OF FUNDS:

REVENUE PRODUCING: Yes No X AMOUNT PER MONTH Year

APPROVED BY: County Atty OMB/Purchasing Risk Management

DIVISION DIRECTOR APPROVAL:

John R. Collins 07/11/05
JOHN R. COLLINS, COUNTY ATTORNEY

DOCUMENTATION: Included X Not Required

DISPOSITION:

AGENDA ITEM #

AMENDED
RESOLUTION NO. 215-2005

**A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, APPROVING A BENEFICIAL USE
DETERMINATION RECOMMENDED ORDER UPON THE
APPLICATION OF MERRICK AND SUZANNE KALAN.**

WHEREAS, a Special Master has issued a Beneficial Use Determination Recommended Order upon the application of Merrick and Suzanne Kalan; and

WHEREAS, the Board of County Commissioners must take action on said Recommended Order; now therefore:

**BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, FLORIDA, as follows:**

1. **Authority to Act.** Pursuant to Section 9.5-174, Monroe County Code, the Board of County Commissioners is the authority to approve, deny, or modify a Beneficial Use Determination Recommended Order issued by a Special Master. The decision by the Board of County Commissioners shall be made during a public hearing at which the public shall be given a right to be heard and make arguments for or against the proposed Determination. A duly noticed public hearing on this matter was held on June 15, 2005.

2. **Procedural Findings.** The Board of County Commissioners finds from the record that Special Master John J. Wolfe conducted the Beneficial Use Determination hearing on October 26, 2004, and said Special Master issued his written Beneficial Use Determination Recommended Order on March 21, 2005. The Board further finds that the Special Master conducted the evidentiary hearing in a manner consistent with Article VI, Monroe County Code, and the Year 2010 Comprehensive Plan. A copy of the Special Master's Recommended Order and its "Exhibit A" is hereby appended to, and made a part of, this Resolution.

3. **Approval and Adoption of Findings of Fact.** The Board of County Commissioners hereby APPROVES the Findings of Fact numbered 1 through 9 as contained in the Recommended Order and ADOPTS the Findings of Fact as the findings of the Board.

4. **Approval and Adoption of Conclusions of Law.** The Board of County Commissioners hereby APPROVES the Conclusions of Law numbered 10 through 13 as contained in the Recommended Order and ADOPTS the Conclusions of Law as the conclusions of the Board.

5. **Adoption of Proposed Determination.** The Board of County Commissioners hereby ~~DENIES~~ APPROVES the Proposed Determination and ADOPTS it as the FINAL DETERMINATION of the Board. The Final Determination is a DENIAL of the Applicant's Beneficial Use Application.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of the Board held on the 20th day of July, 2005.

Mayor Spehar
Mayor Pro Tem McCoy
Commissioner Nelson
Commissioner Neugent
Commissioner Rice

(SEAL)

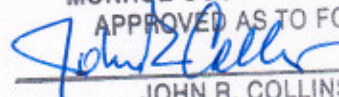
Attest: DANNY L. KOLHAGE, Clerk

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By _____
Deputy Clerk

By _____
Dixie M. Spehar, Mayor/Chairperson

MONROE COUNTY ATTORNEY
APPROVED AS TO FORM:



JOHN R. COLLINS
COUNTY ATTORNEY

Date

07/11/05

RESOLUTION NO. 215 -2005

**A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, APPROVING A BENEFICIAL USE
DETERMINATION RECOMMENDED ORDER UPON THE
APPLICATION OF MERRICK AND SUZANNE KALAN.**

WHEREAS, a Special Master has issued a Beneficial Use Determination Recommended Order upon the application of Merrick and Suzanne Kalan; and

WHEREAS, the Board of County Commissioners must take action on said Recommended Order; now therefore:

**BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, FLORIDA, as follows:**

1. **Authority to Act.** Pursuant to Section 9.5-174, Monroe County Code, the Board of County Commissioners is the authority to approve, deny, or modify a Beneficial Use Determination Recommended Order issued by a Special Master. The decision by the Board of County Commissioners shall be made during a public hearing at which the public shall be given a right to be heard and make arguments for or against the proposed Determination. A duly noticed public hearing on this matter was held on June 15, 2005.

2. **Procedural Findings.** The Board of County Commissioners finds from the record that Special Master John J. Wolfe conducted the Beneficial Use Determination hearing on October 26, 2004, and said Special Master issued his written Beneficial Use Determination Recommended Order on March 21, 2005. The Board further finds that the Special Master conducted the evidentiary hearing in a manner consistent with Article VI, Monroe County Code, and the Year 2010 Comprehensive Plan. A copy of the Special Master's Recommended Order and its "Exhibit A" is hereby appended to, and made a part of, this Resolution.

3. **Approval and Adoption of Findings of Fact.** The Board of County Commissioners hereby APPROVES the Findings of Fact numbered 1 through 9 as contained in the Recommended Order and ADOPTS the Findings of Fact as the findings of the Board.

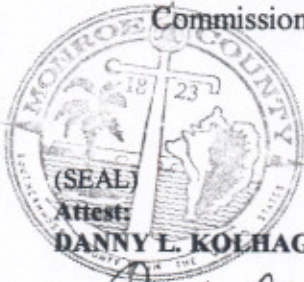
4. **Approval and Adoption of Conclusions of Law.** The Board of County Commissioners hereby APPROVES the Conclusions of Law numbered 10 through 13 as contained in the Recommended Order and ADOPTS the Conclusions of Law as the conclusions of the Board.

5. **Adoption of Proposed Determination.** The Board of County Commissioners hereby DENIES the Proposed Determination and ADOPTS it as the FINAL DETERMINATION of the Board.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of the Board held on the 15th day of June, 2005.

Mayor Spehar
Mayor Pro Tem McCoy
Commissioner Nelson
Commissioner Neugent
Commissioner Rice

Yes
Yes
Yes
Yes
Yes



(SEAL)
Attest: **DANNY L. KOLHAGE, Clerk**

By: *Daniel C. De Santis*
Deputy Clerk

**BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA**

Dixie M. Spehar
By: _____
Dixie M. Spehar, Mayor/Chairperson

FILED FOR RECORD
05 JUN 30 AM 10:26
DANNY L. KOLHAGE
CLK. CIR. CT.
MONROE COUNTY, FLA

MONROE COUNTY ATTORNEY
APPROVED AS TO FORM:

John R. Collins
JOHN R. COLLINS
COUNTY ATTORNEY
Date: 04/05/05

**BENEFICIAL USE
MONROE COUNTY SPECIAL MASTER**

In Re: Merrick and Suzanne Kalan

-Beneficial Use Application

**PROPOSED
DENIAL OF BENEFICIAL USE**

The above entitled matter was heard at a duly-advertised and regularly scheduled public hearing on October 26, 2004, before John J. Wolfe, designated Beneficial Use Special Master. Andrew Tobin represented Merrick and Suzanne Kalan (the "Applicants"). Derek Howard represented Monroe County and Director of Planning & Environmental Resources, Marlene Conaway, Beth LaFleur, Planner and Administrative Assistant, Julie Thomson, were present for Monroe County.

ISSUE

Whether the Applicants have been denied all reasonable economic use of their property due to the fact that they have not received building permits for their property, and whether the Applicants are entitled to relief under the Policies of Objective 101.18.5 of the Monroe County Year 2010 Comprehensive Plan (the "Plan"), and Section 9.5-173 of the Monroe County Code (the "Code").

FINDINGS OF FACT

1. The property of the Applicants subject to this Hearing are unimproved lots located in Cahill Pines and Palms Subdivision, Big Pine Key, and are zoned Improved Subdivision (IS). This zoning allows one single family residential dwelling and accessory uses for each lot.

2. The Applicants purchased Lot 10, Block 4 (RE # 00244200-000000), in May, 1983 for \$55,000, and the adjoining Lot 11 (RE # 00244210-000000) for \$1.00. The Applicants purchased Lot 18, Block 4 (RE # 00244280-000000) in July, 1983 for \$26,000. Such lots are hereinafter collectively referred to as the "Lots".

3. All of the Lots are upland lots located on a canal. The shoreline of Lot 10 has been altered by a seawall. All of the Lots are nearly devoid of vegetation with the exception of some invasive exotics on Lots 10 and 11 and the presence of various native species along the southern property line of Lot 18 and mangrove fringe on the shoreline of Lot 18.

4. The Applicants applied for building permits and entered the Rate of Growth Ordinance ("ROGO") allocation system on April 18, 1997. All lots on Big Pine Key scores a minus ten points for critical habitat due to requirements in the Plan to protect the habitat of Key Deer. Thus, Big Pine

Key lots generally enter the ROGO system with relatively low point scores unless the applicant purchases or combines lots to obtain a higher scoring. The Applicants did not do either. Each Lot has a total of 18 ROGO points, which includes 10 perseverance points. They received one perseverance point for each of the first four years in the ROGO system and two perseverance points for each of the three years thereafter. They will continue to receive two perseverance points per year as long as they are in the ROGO system.

5. The ROGO system allows applicants to apply for Administrative Relief after being in the system for four years pursuant to Code Section 9.5-122.2(f). The Board of County Commissioners conducts a hearing and may as a result of such hearing award an allocation(s) in the next succeeding quarterly allocation period, offer to purchase the property at its fair market value, or suggest other relief as may be necessary or appropriate. Applicants applied for Administrative Relief, but did so one year after the deadline for applying, and thus are no longer eligible to apply for Administrative Relief..

6. After receiving an allocation, an applicant in the ROGO system must also obtain a nutrient reduction credit in order to obtain a building permit. Nutrient reduction credits have been in short supply in recent years, and 95 of the 159 persons who obtained allocation awards did not have nutrient reduction credits. However, it is anticipated that Monroe County will obtain approximately 200 nutrient reduction credits in the near future with the Little Venice wastewater treatment plan coming on line in Marathon. These would be handed out on a first come first serve basis.

7. After receiving an allocation award for a property located on Big Pine Key, an applicant also must obtain a letter of coordination from the U.S. Fish and Wildlife Service ("USF&W"). USF&W is not issuing any such letters until it has approved the Habitat Conservation Plan for Big Pine Key (the "HCP"), which was submitted by the County approximately 18 months ago. Approval had been expected by the County within 6 months.

8. At the date of the hearing, current allocations were not being made pending resolution of an administrative hearing for a proposed rule which would restore some of previously lost ROGO allocations. These allocations had been lost, because the State had determined that the County had not made sufficient progress in bringing waste water treatment plants on line. The State issued the proposed rule after recognizing recent progress, but it was appealed by two groups. If approved, It is expected that allocations which had been lost for the last two years would be restored. The County is working on an ordinance which would protect the positions in line of persons like the Applicants due to the delay caused by the appeal of the proposed rule. The last pre-allocation rankings the Lots received was for the fourth quarter of Year 12 of ROGO and covered the period from April 14, 2004 through July 13, 2004. The pre-allocation rankings were 20, 21 and 22. None of the lots with a higher pre-allocation ranking for such quarter were located on Big Pine Key.

9. Eight market rate allocations may be issued each year on Big Pine Key. There are 32 which have been awarded, but no building permits issued, because USF&W has not issued letters of coordination. The proposed HCP would allow the last two years worth of unissued permits to be issued.

CONCLUSIONS OF LAW

10. The Improved Subdivision designation of the Lots allows one single family residential dwelling on each Lot, and there are no environmental constraints to development on the Lots.

11. Policy 101.18.5 of the Plan provides that neither the provisions of the Plan, nor the LDR'S shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of the plan. This policy further provides that a property owner may apply for relief from the literal application of applicable land use regulations or of the Plan when such application would have the effect of denying all economically reasonable use of that property, unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare of its citizens under Florida law. All reasonable economic use is defined as "the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by current land use case law".

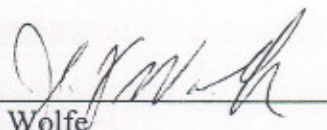
12. Section 9.5-173 of the Code implements the procedure contemplated by Policy 101.18.5 and provides that in order to establish an entitlement to Beneficial Use relief, an applicant must demonstrate that "the Comprehensive Plan and land development regulations" deprive the applicant of all reasonable economic use of the Lot.

13. Applying the above standard to the facts presented herein, it has to be concluded that the Plan and the LDRs do not deny the Applicants all reasonable economic use of the Lots. The Applicants could have filed for Administrative Relief in a timely manner after four years in the system, but did not do so. Failing that, the ROGO system awards two perseverance points per year after year four instead of one. This significantly enhances the competitive position of the Applicants in ROGO. The Applicants also could have combined Lots 10 and 11 for additional points or purchased one or more lots for dedication and obtained additional points. The County and the State have agreed upon a Rule to make up for some of the previously lost allocations due to the failure of the County to adequately address waste water treatment. If this Rule, presently on appeal by two groups, is upheld, there will be additional allocations available. The County has passed the HCP and is waiting on USF&W to respond. This would free up the letter of coordination requirement. In addition, if the proposed ordinance goes into effect, the Applicant's positions in line will be protected by not allowing new applicants to "buy their way" ahead of the Applicants.

PROPOSED DETERMINATION

WHEREFORE, I recommend to the Board of County Commissioners that a final beneficial use determination be entered denying Applicants' beneficial use applications.

DONE AND ORDERED this 21st day of March, 2005.



John J. Wolfe
Special Master